

REMARKS

I. STATUS OF CLAIM

Claims 1-39 are pending. Claims 1 and 30-32 are amended. Support for those amendments can be found in the specification at least on pages 20-27. That disclosure implicitly suggests that the stabilizer and the rheological agent are distinct ingredients of the composition. For example, on page 20 of the present specification, Applicant discloses that “*the polymer particles are stabilized at the surface*, as polymerization proceeds, by virtue of a stabilizing agent” Applicant’s Specification at page 20 (emphasis added). In contrast, on page 25, Applicant explains that “this or these rheological agents are fat soluble agents capable of *thickening and/or gelling the composition*.” *Id.* at page 25 (emphasis added). Although the stabilizer and the rheological agent may overlap in subject matter, they each function in a different capacity. Because the subject matter of the later claim need not be described literally or “in *ipsis verbis*” in order for the specification to satisfy the written description requirement, the amendments to the claims are fully supported by the present application. *See, e.g., In re Lukach*, 442 F.2d 967, 969, 169 U.S.P.Q. 795, 796 (C.C.P.A. 1971). As such, no new matter is added by those amendments to claims 1 or 30-32.

II. CLAIM REJECTION UNDER 35 U.S.C. § 102

The Office maintained the rejection of claims 1-39 under 35 U.S.C. § 102(b) as being anticipated by Mougín et al. (WO 97/00662, published January 9, 1997) relying upon U.S. Patent No. 5,945,095 as its English language equivalent. Office Action at

pages 2 and 3. Based on the comments in support of the original rejection, the Office believes that Mougin teaches “a cosmetic composition comprising fatty substances and pulverulent compounds comprising a dispersion of surface-stabilized polymer particles in a liquid fatty phase.” *Id.* In particular, the Office identifies Mougin as teaching (1) film-forming polymers; (2) liquid fatty substance; (3) stabilizing polymer; and (4) sequential or grafter block copolymers. *Id.* at pages 4 and 5. Relying on those teachings, the Office concludes that claims 1-39 are anticipated by Mougin. Office Action dated November 30, 2005, at pages 3-5. In response to Applicant’s arguments, the Office asserts that because “all polymers are inherently rheological agents . . . [,] the stabilizing agent disclosed by Mougin is also a rheological agent.” Office Action dated August 7, 2006, at pages 5 and 6. Applicant, however, continues to respectfully disagree and traverses the rejection for the reasons of record and for the additional reasons provided below.

Under the Office’s rationale, Mougin’s disclosure of a stabilizer found at Col. 6, line 56-Col. 8, line 13 not only is used to teach the recited **stabilizing agent** but also used to teach the recited **rheological agent** of the present invention. There is nothing, nor has the Office even asserted anything, that would direct the skilled artisan to use such a teaching for both ingredients of the composition. Moreover, as amended, the claims particularly recite that the stabilizer and rheological agent are distinct ingredients of the composition.

As explained, a claim is anticipated only if each and every element as set forth in the claims is found, either expressly or inherently, in a single prior art reference.

M.P.E.P. § 2131 (8th ed. Rev. 3, Aug. 2005). The identical invention must be shown in as complete detail as is contained in, and must be arranged as required by, the claim. *Id.* Further, the reference must “‘clearly and unequivocally’ disclose the claimed compound or direct those skilled in the art to the compound *without any need for picking, choosing, and combining various disclosures . . .*” *In re Arkley*, 455 F.2d 586, 587, 17 U.S.P.Q. 524, 526 (C.C.P.A. 1972) (emphasis added). Accordingly, under Section 102, the reference must disclose the composition or direct a skilled artisan to the composition without the need for picking, choosing and combining various disclosures. *Id.* at 587, 17 U.S.P.Q.2d at 526. This is not the case here.

As disclosed in the present specification at pages 20-25 and 25-27, the stabilizing agent and the rheological agent are distinct, i.e., different, elements. On page 20 of the present specification, Applicant discloses that “*the polymer particles are stabilized at the surface*, as polymerization proceeds, by virtue of a stabilizing agent” Applicant’s Specification at page 20 (emphasis added). In contrast, on page 25, Applicant explains that “this or these rheological agents are fat soluble agents capable of *thickening and/or gelling the composition*.” *Id.* at page 25 (emphasis added). Mougin, however, at Col. 7, ll. 8-10 provides that the stabilizing polymers are absorbed onto the surface of the polymer particles and therefore, cannot be available as thickeners.

In this case, a skilled artisan would have to not only use a stabilizer, but also use a second stabilizer in a manner not even suggested, much less taught by Mougin. In addition, the second stabilizer could not just be any stabilizer; it must be one that has at

least one block resulting from the polymerization of dienes. To arrive at such a conclusion from the teachings of Mougin, one would have to at least pick, choose, and combine various disclosures without any instruction from Mougin. Because Mougin's disclosure does not identically disclose the present invention, Mougin cannot serve as a Section 102 reference anticipating claims 1-39, as provided by the Office. Accordingly, the rejection is improper and Applicant respectfully requests its withdrawal.

III. DOUBLE PATENTING

The Office rejects claims 1 and 10 on the ground of nonstatutory obviousness type double patenting over claim 1 of U.S. Patent No. 6,254,876 ("the '876 patent"). Office Action at page 4. The Office also rejects claims 1 and 10 on the ground of nonstatutory obviousness type double patenting over claim 1 of U.S. Patent No. 6,254,877 ("the '877 patent") and claim 1 of U.S. Patent No. 6,682,748 ("the '748 patent"). *Id.* at pages 4 and 5. Applicant respectfully disagrees and traverses the rejection for the following reasons.

The Office asserts that because the '876, '877, and '748 patents disclose stabilizing agents and "polymeric stabilizing agents . . . are inherently rheological agents . . . [,] the language of the present claims does not preclude the stabilizing agent from also functioning as a rheological agent." Office Action at page 4. As provided in the amended claims, the recited stabilizer and the rheological agent are different ingredients of the composition. As such, the disclosure directed to stabilizing agents in the '876, '877, and '748 patents is not sufficient to render obvious the recitation of the

rheological agent, as explained above with respect to the Section 102 rejection.

Accordingly, Applicant respectfully requests the withdrawal of those rejections.

IV. CONCLUSION

In view of the foregoing amendments and remarks, Applicant respectfully requests reconsideration of this application and the timely allowance of the pending claims.


If the Examiner believes that a telephone conference call could be useful in resolving any outstanding issues, he is respectfully urged to contact Applicant's undersigned counsel at 202.408.4345.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: February 6, 2007

By: 
Adriana L. Burgy
Reg. No. 48,564